German Tax Monthly

Information on the latest tax developments in Germany

May | 2020

Ministerial Draft Bill for an Act on the Implementation of the ATAD

The Federal Ministry of Finance [BMF] has presented a new ministerial draft bill for an **Act on the Implementation of the Anti Tax Avoidance Directive** (ATAD Implementation Act), dated 24 March 2020, for interdepartmental coordination.

The present draft law is intended to implement the following provisions of the ATAD:

- Exit taxation (Article 5 ATAD)
- CFC rules (Articles 7, 8 ATAD)
- Hybrid mismatches (Articles 9, 9b ATAD).

Moreover, the provisions on the arm's length principle under §§ 1,1a,1b of the Foreign Transactions Tax Law [Außensteuergesetz (AStG-E)) shall be amended, and a legal basis for advanced pricing agreements shall be established.

Compared to the first ministerial draft bill of 10 December 2019 (see January 2020 edition of German Tax Monthly), in particular the following changes result from the ministerial draft bill of 24 March 2020:

CFC rules: The revision of the CFC rules shall first be applicable for the assessment period for which intermediary income is to be imputed that accrued in a fiscal year of the intermediary company commencing after 31 December 2020.

Up to now, a tax return for the application of the CFC rules must also be filed if the motive test can be performed. Henceforth, mere notification shall be sufficient in these cases. The notification must include the information relevant for the examination of the prerequisites of the motive test; in particular, name, address, economic activity of the foreign company, participation relationships and identifiers of the shareholders in the foreign company. The competent tax office, however, may request submission of a separate tax return in these cases if, after examination of the filed documents, e.g. doubts with respect to the existence of a substantive economic activity of the foreign company should arise.

Content

Hybrid mismatches: The new provisions shall be applicable for the first time to expenses arising after 31 December 2019. Expenses, however, which have been legally caused already before 1 January 2020 shall only be subject to the new provision under certain additional conditions. Accordingly, expenses are only captured if based on a continuous obligation which has remained essentially unchanged after 31 December 2019 and if they could have been avoided after 31 December 2019 without substantial disadvantages. A substantial disadvantage shall be given if any costs incurred in connection with the avoidance of the expenses exceed the tax advantage resulting from the taxation mismatch.

Transfer pricing: A considerable amendment is the new § 1a AStG-E providing for an income adjustment for cross-border financing relationships between related persons.

It shall not be in line with the arm's length principle if an expense resulting from a cross-border financing relationship (e.g. loan) within a multinational group of companies leads to a reduction of the income and

1. the taxpayer cannot credibly show that (a) from the outset, it could have serviced the debt for the entire financing term and (b) the financing is economically required and used for the business purpose

or

2. to the extent that the agreed interest rate exceeds the interest rate at which the multinational group as such could finance itself vis à vis third parties unless, on a case by case basis, another value corresponds to the arm's length principle.

The new provision moreover provides for a legal classification of the pure intermediary service or forwarding of a financing relationship, the typical treasury function and the cash pooling as a low-function and low-risk service which is to be compensated accordingly (low). The taxpayer may show, by way of a function and risk analysis, that the service provided is not low-function and low-risk.

The amended provisions on the arm's length principle pursuant to §§ 1, 1a and 1b AStG-E shall first be applicable for the assessment period 2021. The lowering of the threshold for the preparation of the master file shall be applicable as of 1 January 2021. The first application of the changed filing requirement for the records may be prescribed by the BMF by ordinance.

After the cabinet's decision, the publication of the government draft bill follows subsequently, on which the Bundesrat [upper house of the German parliament] is entitled to comment. The decisions of the Bundestag [lower house of the German parliament] and the Bundesrat follow thereafter. Hence, until the conclusion of the legislative procedure in the course of this year, amendments can still be made. Generally speaking, the law shall enter into force on the day after its promulgation in the Federal Law Gazette.

Lower Tax Court of Lower Saxony (6 K 69/17): Definitive Losses of a Permanent Establishment

In its judgment of 28 November 2019, the Lower Tax Court of Lower Saxony held that taxation based on financial performance requires that losses generated by a resident taxpayer in another EU member state can be deducted if due to the cessation of activities in the other member state the deduction of losses will no longer be possible there in the long term.

In the case under dispute, the plaintiff, a German limited liability company, claimed a tax deduction in Germany for loss carryforwards of its Polish permanent establishment, closed in 2009, that could no longer be utilised for the years under dispute from 2007 to 2009. The tax office rejected the utilisation of tax-loss carryforwards across borders, as such recognition is in clear contravention of judgments by the European Court of Justice (ECJ) and the German Federal Tax Court [BFH].

The lower tax court upheld the complaint. In the opinion of the lower tax court, the ECJ judgment cited by the tax office has become obsolete by virtue of the ECJ judgment 'Bevola and Jens W. Trock' of 12 June 2018 (C-650/16; see July 2018 edition of German Tax Monthly) providing sufficient clarity. Taxation based on financial performance requires that losses generated by a resident taxpayer in another EU member state can be deducted if – as in the case under dispute – due to the cessation of activities in the other member state the deduction of losses will no longer be possible there in the long term.

The exceptional deduction of losses of a permanent establishment must occur in the tax assessment period in which the losses have become 'definitive'. In the case under dispute, this did not arise until 2009 when liquidation of the Polish permanent establishment was decided and implemented. The plaintiff provided sufficient evidence of the discontinuation and liquidation of the Polish branch establishment by providing

an excerpt from the national court register.

The judgment of the Lower Tax Court of Lower Saxony is final. The Lower Tax Court of Hesse had already ruled in favour of the taxpayer in a similar case in its judgment of 4 September 2018 (file ref. 4 K 385/17, see November 2018 edition of German Tax Monthly; appeal pending before the German Federal Tax Court [BFH] under file ref. I R 32/18). In total, there are currently four cases pending before the BFH regarding definitive losses of permanent establishments (file ref. I R 17/16, I R 48/17, I R 49/17 and I R 32/18). Therefore, it remains to be seen whether the BFH will amend its previous judgments in view of the most recent principles of interpretation handed down by the ECJ.

Lower Tax Court of Lower Saxony (6 K 356/18): Date of Application pursuant to § 8d Corporate Income Tax Act

In its decision of 28 November 2019, the Lower Tax Court of Lower Saxony ruled that an application pursuant to § 8d Corporate Income Tax Act [KStG] may also be submitted after filing a tax return for the first time. In a similar case, the Finance Court of Thuringia had previously ruled that Section 8d para. 1 sent. 5 KStG did not contain a statutory preclusive period.

According to the loss deduction limitation under § 8c KStG, unused tax losses of a corporation are no longer deductible, if more than 50% of the shares are transferred to a purchaser within five years (so-called detrimental change in ownership). The Law on the Further Development of the Corporate Tax Loss Utilization introduced a new provision, § 8d KStG, which provides for an exemption to the loss forfeiture in case of a detrimental change in ownership under § 8c KStG.

Pursuant to § 8d KStG, losses and interest carryforwards should be retained on application, despite a detrimental change in ownership within the meaning of § 8c KStG, if the corporation since its inception or for at least three years has not changed its business operations. Another prerequisite is that no detrimental event within the meaning of § 8d (2) KStG has occurred during that period until the end of the tax assessment period. Such an event could be, inter alia, discontinuation, suspension or change of business operations. Such an event may also not arise after the end of tax assessment period for the detrimental change in ownership. It is furthermore detrimental if the corporation acquires or already has ownership interests in a business partnership or the corporation assumes or already has the role of controlling entity.

In the case under dispute, the plaintiff, a German limited liability company, submitted the corporate income tax return for the year under dispute (2017) to the tax office in 2018. It declared a detrimental change in ownership within the meaning of § 8c KStG, however did initially not submit an application pursuant to § 8d KStG. The plaintiff also filed the corporate income tax return for 2017 electronically in 2018 and, in doing so, submitted an application pursuant to § 8d KStG. The plaintiff also submitted such an application in the course of appeal of the corporate income tax and loss assessment notice for 2017. The tax office rejected the application, noting that the deadline for application had expired and that subsequent submission was not permissible.

In the opinion of the Lower Tax Court of Lower Saxony, the right to apply set out in § 8d (1) sent. 5 KStG can be legally exercised until the corporate income tax assessment becomes legally binding (in substance). The rule does not provide for a limitation period, neither according to the letter nor spirit of the law. In the event of a limitation period, application pursuant to § 8d KStG would no longer be feasible, for example when a detrimental change in ownership is not identified until a tax audit is performed.

The appeal before the BFH has been lodged under file ref. I R 3/20.

Tax Measures to take the Effects of Coronavirus into Consideration

The Federal Government has adopted several measures to cushion the economic impact of coronavirus (COVID-19). Regarding tax payments they usually offer liquidity support. These measures are complemented by further measures of the federal states. As tax liquidity support, improved possibilities for deferral of tax payments, reduction of advance payments and in the area of enforcement are to be provided. In addition, some federal states grant extensions regarding the filing of tax returns for 2018 as well as the refund of VAT special preliminary payments.

On 19 March 2020, the Federal Ministry of Finance (BMF) published a guidance on tax measures to take the effects of coronavirus into consideration. Also on 19 March 2020, the German federal states published a decree on trade tax measures to account for the effects of coronavirus. The finance ministries and tax authorities of several federal states have published

information and application forms for the coronavirus tax measures. According to the administrative instructions, adjustments to advance payments of corporate income tax and trade tax can be made "on presentation of their circumstances" for "taxpayers who can be shown to be directly and significantly affected", if it is foreseeable that due to decreasing sales during the coronavirus crisis profits will be significantly lower than estimated. Applications for a reduction of advance payments can be submitted until 31 December 2020.

In addition, applications can be submitted for deferral of tax (corporate income tax and VAT) already due or becoming due until 31 December 2020. These applications are not to be rejected because the taxpayers are not able to prove the amount of the losses incurred in detail. No strict requirements are to be set when reviewing the conditions for deferral. Application for the deferral of tax is only possible after they have been assessed. If the tax authorities become aware that the debtor is directly and considerably affected, enforcement measures shall be waived until 31 December 2020 for all taxes in arrears or due by that date. In the respective cases, the late payment penalties for these taxes incurred from 19 March until 31 December 2020 shall be waived as of 31 December 2020.

An "anticipated loss carryback" was implemented by the guidance of the BMF from 24 April 2020. Companies affected by the coronavirus crisis can offset their losses expected to be incurred in 2020 against profits from 2019 - and thus before the tax office formally determines the losses in the context of the tax assessment for the assessment period 2020. According to the guidance, companies which are directly and considerably negatively affected in 2020 can expect losses of up to 15 % of their profits 2019. This lump-sum carryback is done by subsequently reducing the tax advance payments for 2019, which usually leads to a refund. The limit for the loss carryback is - as regulated by law - the amount of €1.000.000.

Imprint

Published by
KPMG AG Wirtschafts-prüfungsgesellschaft
THE SQUAIRE, Am Flughafen
60549 Frankfurt/Main, Germany

Editorial Team
Prof. Dr. Gerrit Adrian (Responsible*)
gadrian@kpmg.com

Dr. Martin Ribbrock
Ilhan Yilmaz

Newsletter subscription
https://www.kpmg.de/newsletter/subscribe.aspx

*Responsible according to German Law (§7 (2) Berliner PresseG)

kpmg.de

kpmg.de/socialmedia.de